STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY CARL LAURY, II,

Defendant-Appellant.

UNPUBLISHED
September 23, 2003

No. 238490
Saginaw Circuit Court
LC No. 00-018576-FC

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of imprisonment of two years for the felony-firearm conviction, and twenty to sixty years for the murder conviction. He appeals as of right. We affirm.

I. Facts

On March 13, 2000, defendant shot his girlfriend, Kashaundra Banks, who died of the resultant wound to the neck. The evidence suggested that, pursuant to innuendoes that defendant was not the father of Banks' young son, defendant, immediately before the shooting, retrieved a gun from storage, loaded it, cocked it, and pointed it at Banks over her protestations.

Defendant was charged with open murder and felony-firearm. The defense maintained that the shooting was the result of non-malicious recklessness, and asked the jury to find defendant guilty of involuntary manslaughter,[1] or reckless discharge of a firearm,[2] instead of murder. The jury found defendant guilty of second-degree murder, along with felony-firearm. This appeal followed.

II. Sufficiency of the Evidence

[1] MCL 750.321.

[2] MCL 752.861.

Defendant argues that the prosecutor failed to present sufficient evidence to support his conviction of second-degree murder, on the ground that the prosecutor failed to prove intent as required for that crime. We disagree.

When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

As an initial matter, we observe that defendant's phrasing of the question presented, to include the assertion that the "prosecution . . . did not prove beyond a reasonable doubt that the shooting of Kashaundra Banks was not an accident," reveals a basic misunderstanding of the law. The prosecutor's task is to prove the prosecution's own theory of guilt beyond a reasonable doubt, in the face of whatever contradictory evidence the defense may produce; the prosecutor need not *disprove* any particular theory advanced by the defense. See *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002), and *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984).

Although acting with the intent to kill will satisfy the malice element for second-degree murder, specific intent is not required. For purposes of that crime, "[t]he intent to do an act in obvious disregard of life-endangering consequences is a malicious intent." *People v Goecke*, 457 Mich 442, 466; 579 NW2d 868 (1998). Although the rule is frequently stated as requiring that the actor create the "probability," or "likelihood" of death or great bodily harm, see, e.g., *id.* at 466-467 (citations omitted), the normal meaning of those terms, suggesting more likely than not, has given way for purposes of satisfying the intent element for murder to "heedless disregard of a harmful result, foreseen as a likely *possibility* . . . ." *Id.* at 466 (emphasis added), quoting Perkins & Boyce, Criminal Law (3d ed), ch 7, § 4, p 858. Earlier, in *People v Aaron*, 409 Mich 672, 729; 299 NW2d 304 (1980), our Supreme Court indicated that the malice element for murder could be satisfied by "a wanton and willful disregard of the likelihood that the *natural tendency* of [a] defendant's behavior is to cause death or great bodily harm . . . ." (emphasis added.) The latter formulation speaks not to a likelihood of causing death or great bodily harm, but rather to a likelihood that the "natural tendency" of the conduct is to have that result. This was paraphrased in *Goecke* as inferring malice "from evidence that a defendant intentionally set in motion a force whose natural tendency is to cause death or great bodily harm." *Goecke, supra* at 467 n 29. What need be the *likely* or *probable* result of the actor's recklessness is that the conduct give rise to the mere "possibility" that death or great bodily harm may result. *Id.* at 466; *Aaron, supra* at 727-729. Further, "[a]n actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Fetterley, supra* at 517-518 (citations omitted).

In this case, an eyewitness testified that defendant, pursuant to discussions with Banks questioning his paternity of what he had believed was his young son by her, retrieved a gun from storage, and pointed it at Banks. As defendant points out, that witness, his sister, described the shooting in terms suggesting that it was wholly unintentional, reporting that defendant was never angry in the event, and that the discussion about parentage was not serious. Those facets of the witness' testimony were for the jury to credit or not as it saw fit. "It is the province of the jury to

determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Further, defendant himself admitted to the police that he had loaded the gun, cocked it, and "played" with it, including by way of pointing it at Banks. Although defendant first said that he had dropped the gun, which caused it to discharge, he later admitted that he had not dropped it, but agreed with the investigator's suggestion that, while he was pointing the cocked gun at Banks, it went off while he was trying to "uncock" it.

The jury apparently concluded that defendant did not act with premeditation and deliberation, but was free to conclude that defendant brandished his loaded gun in a menacing and dangerous manner, while feeling some hostility toward Banks, in time succumbing to an unpremeditated urge to pull the trigger, or at least with a reckless intent to put Banks at serious risk of a lethal accident. The evidence, considered as a whole, and in the light most favorable to the prosecution, was sufficient to persuade a rational trier of fact that defendant acted with "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke, supra* at 464.

III. Effective Assistance of Counsel

Defendant argues that he was convicted without the effective assistance of counsel. We disagree.

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. The constitutional right to counsel is a right to the *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Because defendant did not move for a new trial or a *Ginther*[3] hearing below, our review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

A. Admitting Guilt

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant argues that trial counsel was ineffective because counsel conceded to the jury that defendant should be found guilty in connection with the homicide. This argument is without merit.

In closing argument, defense counsel conceded that defendant "must be held responsible for what he did," characterized defendant's actions as "stupid" and "negligent," and stated, "two words you've never heard from my lips all through this trial is not guilty. . . . This is not a not guilty case but this is a proper assessment of responsibility case." Defense counsel summarized his position, "I believe [defendant] has to be held responsible on the evidence for what he did, but he should not be punished for what he didn't do. He caused the death of [Kashaundra Banks] in a manner that makes him legally responsible, but he's not a murderer."

As defendant concedes, it is not ineffective assistance of counsel for defense counsel to concede lesser crimes in hopes of avoiding a finding of guilt on greater ones. *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). Defendant nonetheless argues that counsel erred in this instance by failing to urge the defense of accident and a verdict of not guilty. We disagree.

Defendant was at risk of being found guilty of first-degree murder, and thus receiving the concomitant life sentence without parole that necessarily follows. MCL 750.316(1)(a). Defendant argues that there was no strategic advantage in conceding lesser crimes to avoid that harsh result, because the evidence could not have supported a first-degree murder conviction here. We do not share defendant's view of the evidence. Defendant did not just shoot Banks, but before that retrieved a gun, brandished it, cocked it, pointed it at Banks over her protestations, and interrogated her about the parentage of what he had thought was his son. A jury could well have concluded from this evidence that defendant acted with premeditation and deliberation. Defense counsel thus correctly identified an imperative in the matter that warranted conceding lesser crimes in hopes of drawing the jury away from the greater.[4]

Defendant belabors that defense counsel nowhere used the word "accident" in statements to the jury, but this alleged deficiency hardly constituted a failure to defend. Obviously inhering within defense counsel's emphasis that defendant acted negligently, and might well be convicted of manslaughter or reckless discharge of a firearm, was the assertion that the shooting was unintentional. No reasonable interpretation of the evidence could suggest that the shooting was a pure accident of the sort that would obviate all potential criminal liability; in light of overwhelming evidence that defendant intended to point a loaded gun at Banks, at close range, with its hammer cocked and, at best, kept the gun so positioned while trying to "uncock" the hammer, defense counsel correctly recognized that there was no escaping the conclusion that defendant had acted with at least a level of gross negligence sufficient to bring criminal liability.[5]

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[4] Defendant's insistence that defense counsel wholly failed to subject the prosecutor's case to meaningful adversarial testing is inapt. Had there been no such testing, defendant would likely have been convicted of first-degree premeditated murder.

[5] Again, defendant had initially maintained that he innocently dropped the gun, and that it discharged as the result, but later admitted to the police that he had fabricated that aspect of his account in hopes of improving his position in the matter. In any event, expert testimony in this case indicated that the trajectory of the fatal bullet was incompatible with the theory that the gun

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It was thus legitimate trial strategy for counsel to concede some responsibility in the course of urging the jury to eschew conviction of the crimes involving the greater degrees of criminal culpability.

B. Evidence of Experience with Firearms

Defendant's sister testified that defendant had brought a gun to her house the previous summer, albeit a different one from that involved in the instant case, and defendant's cousin briefly mentioned having also seen defendant with a gun before March 13, 2000, adding that he thought he remembered the gun as an automatic. The jury further heard a taped interview between defendant and the police in which defendant confirmed that his sister had seen him with a gun previously, and freely admitted to considerable experience with various kinds of firearms, characterizing his handling of them as "real good" while admitting to having actually shot them only five or six times.

Defendant argues that defense counsel should have moved the trial court to exclude this evidence, pursuant to the strictures governing evidence of uncharged bad acts, MRE 404(b), or on the ground that the danger of unfair prejudice substantially outweighed its probative value, MRE 403. We conclude that defense counsel had nothing to gain from any such motion. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (counsel is not obliged to argue futile motions).

This evidence brought to light no necessarily illegal, or otherwise wrongful, conduct at all. A general familiarity with firearms need not suggest anything pernicious, but may in fact comport with responsible gun ownership. See US Const, Am II; Const 1963, art 1, § 6; Levinson, *The Embarrassing Second Amendment*, 99 Yale L J 637 (1989). Because no crimes or other wrongful conduct came to light attendant to the evidence of defendant's history with guns, this evidence did not present "bad acts" for purposes of bringing MRE 404(b) to bear.

For the same reason, very little risk of unfair prejudice accompanied this evidence, which was relevant insofar as it shed light on the prosecution's theory of premeditation, and the defense's insistence that the shooting was unintentional. Had defense counsel asked the trial court to apply a balancing test pursuant to MRE 403, the court would properly have ruled in favor of admission.

Defendant additionally argues that defense counsel was ineffective for having declined to request a limiting instruction on the use of the evidence of defendant's familiarity with guns, citing MRE 105. Because that rule concerns instructing a jury judging multiple defendants to keep in mind the purposes for which evidence is admitted, where those purposes vary among the defendants, it is inapplicable here. In any event, because we conclude above that the challenged

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fired upon impact with the floor or bed. Defense counsel thus reasonably hoped to gain some credibility by conceding in closing argument that defendant had lied about dropping the gun only as an early attempt to explain the incident.

evidence did not bring any wrongful conduct to light, we conclude here that defense counsel was not ineffective for failure to seek a limiting instruction on its use.[6]

C. Cross-Examination

Defendant points out that defense counsel's cross-examination of defendant's sister brought out information in some respects supplemental to what the prosecutor had elicited, and argues generally that defense counsel thus magnified the prosecution's case without helping that of the defense. However, defendant fails to present, with specificity or citations, any particular instances where testimony from this witness on cross-examination in fact damaged the defense. This failure of presentation waives appellate review. MCR 7.212(C)(7); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

We find no merit in this argument in any event. Defense counsel's elicitation of further details from defendant's sister was obviously intended to amplify the defense theory that the shooting was, if not wholly innocent, at least unintentional. Further, defendant cites no authority for the proposition that a defense lawyer is ineffective if not every detail elicited from an eyewitness is unfavorable to the prosecution.

D. Decision not to Testify

Defendant argues that defense counsel erred in advising him not to testify in his own defense, and in informing the jury of that tactic. However, the decision whether to testify is obviously one of great *tactical* significance. Counsel may well advise even an innocent defendant not to take the stand, if counsel is concerned that the prosecutor may nonetheless get the better of the defendant. In any event, however, the decision whether to testify is the defendant's own, personally to make. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987).[7] In this case, the transcript clearly shows that defense counsel was mindful that defendant himself was the one to make this important decision, and that defendant freely chose to accept counsel's advice not to testify. To make issue of that decision on appeal is simply to

[6] Defendant also casts this evidentiary issue as one of prosecutorial misconduct, suggesting that it was improper for the prosecutor to seek to introduce evidence of defendant's proficiency in the use of firearms at all, and that such evidence tended to encourage the jury to convict because it showed defendant's general bad character. Because this evidence was relevant, and carried little potential for unfair prejudice, we reject both contentions. "A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003).

[7] But see *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000) (where a defendant insisted on testifying, counsel's failure to ensure that the jury fully understood the defendant's account of events did not constitute ineffective assistance, because that account was "so unbelievable that defendant was arguably better off letting the jury speculate about what he was really trying to say"). In this case, there is no suggestion that defendant wished to testify notwithstanding the advice of counsel.

ask for the chance to try an alternate strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); see also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

This applies not only to the decision to recommend against testifying, but also to the decision to explain the matter plainly to the jury. Defense counsel could legitimately suppose that the subject of defendant's lack of testimony would arise during deliberations, and thus could legitimately seek to minimize any possible prejudice in the matter with his own explanation.

D. Sentencing

Defendant argues that certain events at sentencing showed a general lack of preparedness on the part of defense counsel, and more specifically attacks counsel's performance in connection with the scoring of certain items under the sentencing guidelines.[8]

1. General

Defendant complains that defense counsel conceded that the jury's conclusion that defendant had acted with the degree of recklessness required for second-degree murder was "frankly . . . appropriate." However, defendant cites no authority for the proposition that such candor at sentencing is error. Because defense counsel's statement was, as discussed above, an accurate reflection of what the evidence tended to show, counsel's candor in the matter at sentencing did not constitute ineffective assistance.

Defendant additionally makes issue of the following statement of defense counsel:

> I do believe though that the jury was absolutely correct when they rejected any intent on the part of [defendant] to kill this young lady or to do her great bodily harm. It was the negligence. It was the gross negligence. It was the reckless disregard, whatever label we wish to attach that we're familiar with through the practice of law that applied to this factual situation, and [defendant] is responsible for that.

Defendant argues that counsel's remarks display "ignorance of the concepts of the varying degrees of culpability." We disagree. Defense counsel was emphasizing his agreement with the jury's decision to eschew conviction of first-degree premeditated murder, not the precise finding of guilt on a lesser crime. As counsel expressly indicated, he was speaking to the court as one experienced practitioner to another, and thus did not feel obliged to offer textbook language while observing that the jury found against specific intent in this instance.

[8] Because the conduct for which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines, enacted pursuant to MCL 769.34, were used to determine the recommended range of defendant's minimum sentence.

Similarly, we do not regard it as error that defense counsel, in his statements to the jury, spoke only in general terms, not legally precise ones, concerning the defense's theory that the shooting was unintentional. As the jury was instructed by the trial court, and as defense counsel himself was presumably aware, instructions on the law come from the court, not counsel. In conjunction with that instruction, the trial court spelled out, in proper detail, just what was required for conviction of the various crimes the jury was obliged to consider. It was not error for defense counsel to speak generally about such things as intent, properly leaving it to the trial court to spell out the black letter law on the matter.

2. Scoring of the Sentencing Guidelines

Finally, defendant challenges the scoring of certain of the variables under the sentencing guidelines. However, on appeal, a party may not challenge the scoring of the sentencing guidelines, or the accuracy of the information used in imposing a sentence within the guidelines range, unless the issue was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court. MCL 769.34(10); MCR 6.429(C); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). If the minimum sentence imposed was within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the guidelines or absent inaccurate information relied upon in determining the defendant's sentence. *Id*.; *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Defendant brings his appellate scoring challenges by arguing that defense counsel was ineffective for failure to preserve them below. See *Harmon, supra*.

Defendant first points out that the trial court imposed a sentence of twenty to sixty years for second-degree murder, but that the sentencing hearing was then reconvened in part because the sentencing information report erroneously reflected an assessment of one hundred points pursuant to offense variable (OV) 3. That variable concerns physical injury to the victim, MCL 777.33(1)(a), but should not be scored where some form of homicide is itself the sentencing offense, MCL 777.33(2)(b). The trial court noted, however, that adjusting the scoring accordingly nonetheless left defendant's twenty-year sentence within the resultant range, declared that that minimum was appropriate under the circumstances, and declined to change it.

Defendant additionally makes issue of three other scoring variables. We reject defendant's cursory assertion that there was no basis for assessing points pursuant to OV 5, which concerns psychological injury to a member of the victim's family. MCL 777.35. The trial court noted that the victim was survived by her young son, whose caregivers would have to "explain to the . . . child why he does not have a mother like all the other children," and that the child's loss "imposes . . . incomprehensible . . . additional concerns for the family." The statements of the victim's grandmother, grandfather, and uncle well bear this out.

Defendant offers solid argument why his scores for prior record variable 7 and OV 17 should be zero, apparently failing to notice that the court accepted such arguments below, and noted the appropriate corrections on the record at sentencing. The SIR signed by the trial court reflects scores of zero for those two variables. With these arguments, defendant is demanding relief already received.

Because defendant's minimum sentence falls within the range recommended by the guidelines, as properly scored, resentencing is not required. *Harmon, supra*; *Leversee, supra*. Accordingly, we conclude that defendant suffered no prejudice from any failure on defense counsel's part in this regard.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray